Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-272

THOMAS LLOYD SCRUGGS - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Petition for Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS AND AUTHORITIES

	PAGE
Statement of the Questions Presented	iii
Opinion Below	1
Jurisdiction	1- 5
Summary	5
Proof of Service	6

TABLE OF CASES

	PAGE
Abernathy v. Commonwealth, Ky., 439 S. W. 2d 949 (1969)	3
Barrington v. Missouri, 205 U. S. 483 (1907)	3
Cardinale v. Louisiana, 394 U. S. 437 (1969)	4
Chapman v. California, 386 U. S. 18 (1967)	2
Department of Mental Hygiene v. Kirchner, 380 U. S. 194 (1965)	4
Edwards v. Commonwealth, Ky., 554 S. W. 2d 380 (1977)	3
Hammerstein v. Superior Court of California, in and for Los Angeles County, 340 U. S. 622 (1951)	3
Harrington v. California, 395 U. S. 250 (1969)	2
Henry v. Williams, 299 F. Supp. 36 (N.D. Miss. 1969)	3
Missouri Pacific Railroad Company v. Hannah, 266 U. S. 184 (1924)	3
Richardson v. Commonwealth, Ky. App., 559 S. W. 2d 738 (1978)	3
Scruggs v. Commonwealth, Ky., 566 S. W. 2d 405 (1978)	1
Miscellaneous:	
RCr 9.24	2
RCr 9.26	2
RCr 9.48	4
Supreme Court Rule 19	4, 5
28 USC § 1257(3)	1

STATEMENT OF THE QUESTIONS PRESENTED

I. **Whether the Kentucky Supreme Court erred in finding that petitioner had not been substantially prejudiced by the trial court's refusal to permit him to cross-examine a prosecution witness as to his motive for testifying?**

II. **Whether the Kentucky Supreme Court erred in finding that petitioner was not substantially prejudiced by the trial court's refusal to permit petitioner to introduce the testimony of an allegedly corroborating witness?**

III. **Whether the prosecutor's comment during summation to the jury that petitioner had entertained the thought of pleadng guilty violated federal constitutional rights?**

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v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Opinion Below from the Kentucky Supreme Court is reported at *Scruggs* v. *Commonwealth,* Ky., 566 S. W. 2d 405 (1978). The respondent adopts the facts as set out in that Opinion by that court. That Opinion is also correctly set out in the Appendix of the Petition for Writ of Certiorari.

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of 28 USC § 1257(3).

The Petition for Writ of Certiorari is predicated upon the following three contentions: (1) Whether the Kentucky Supreme Court erred in finding that the petitioner had not been substantially prejudiced by the trial court's refusal to permit him to cross-examine

Jerry Fann, a prosecution witness, as to his motive for testifying, or, (2) By the refusal of the trial court to allow an allegedly key corroborating defense witness, W. D. Weaver, to testify, and (3) Did the Kentucky Supreme Court fail to recognize error of federal constitutional proportions with regard to a comment made by the prosecutor in summation as to the fact that the petitioner had entertained the thought of pleading guilty? The respondent respectfully disagrees with each of the foregoing contentions and submits that none of them establish a basis upon which to exercise the discretionary application of this Court's power by writ of certiorari.

(I. and II.) In his Petition for Rehearing before the Kentucky Supreme Court and now, in his Petition for Writ of Certiorari before this Court, petitioner steadfastly maintains that the Kentucky Supreme Court's finding that the petitioner had not been substantially prejudiced by the errors committed by the trial court conflicts with this Court's holding in *Chapman* v. *California,* 386 U. S. 18 (1967).[1] The respondent respectfully disagrees.

What the petitioner fails to recognize is that the Kentucky Supreme Court applied its *state rule* as to these issues with respect as to whether the petitioner had been *substantially* prejudiced by the trial court's errors. RCr 9.24; RCr 9.26. The standard in Kentucky for determining whether prejudice to the accused is so great as to require reversal of his conviction:

[1]Also see, *Harrington* v. *California,* 395 U. S. 250 (1969).

whether, upon a consideration of the whole case, there is a substantial possibility that the result would have been any different had the error not occurred. *Abernathy* v. *Commonwealth,* Ky., 439 S. W. 2d 949 (1969); *Edwards* v. *Commonwealth,* Ky., 554 S. W. 2d 380, 384 (1977); and *Richardson* v. *Commonwealth,* Ky. App., 559 S. W. 2d 738 (1978).

Obviously, with respect to the application of the harmless error rule, the Kentucky Supreme Court was ruling on a matter of state law and therefore its ruling, with respect to contentions one and two as presented by the petitioner in the instant petition, cannot now be made a matter for review by certiorari before this Court. *Barrington* v. *Missouri,* 205 U. S. 483 (1907). After all, this Court has repeatedly indicated that it will not review by certiorari state court judgments which, as here, rest upon adequate state grounds. *Hammerstein* v. *Superior Court of California, in and for Los Angeles County,* 340 U. S. 622 (1951). This is true notwithstanding the court co-presence of federal grounds presented in the state courts. *Henry* v. *Williams,* 299 F. Supp. 36 (N.D. Miss. 1969). Accordingly, the respondent respectfully submits that this Court lacks jurisdiction to review the issues now presented. *Missouri Pacific Railroad Company* v. *Hannah,* 266 U. S. 184 (1924).

Secondly, the respondent urges that this Court is without jurisdiction to consider the first two contentions raised in the petition because neither of those contentions present an issue of such substance as would authorize, much less require, that the discretionary

jurisdiction of this Court be exercised. *Department of Mental Hygiene* v. *Kirchner,* 380 U. S. 194 (1965); *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969). For example, petitioner's basic complaint as to his inability to "confront" prosecution witness Fann is rendered specious under the trial record where, as noted by the Kentucky Supreme Court, petitioner had the advantage of a lengthy cross-examination of Fann (TE, Vol. III, pp. 10-45). Moreover, the fact that the trial court refused to permit petitioner to cross-examine Fann as to the extent of his sexual relationship with the deceased is not of sufficient import, in light of the record, to have substantially prejudiced petitioner's right to a fair trial. The petitioner's other contention dealing with the refusal of the trial court to permit him to examine a W. D. Weaver because of an apparent violation of the Kentucky rule of separation of witnesses (RCr 9.48) is also without constitutional magnitude. What Weaver would have testified to was not as such substance as would have substantially prejudiced the petitioner (TE, Vol. VII, pp. 82-83). Clearly, the foregoing issues do not arise under such exceptional circumstances as to require this Court to review the decision of the Kentucky Supreme Court. Supreme Court Rule 19.

(III.) The petitioner's final contention as to an impermissible comment made by the prosecutor in his summation to the jury was not even mentioned by the Kentucky Supreme Court in its Opinion.[2] The comment was as follows:

[2]For that matter, this issue was not presented by the petitioner in his Petition for Rehearing to the Kentucky Supreme Court.

> "Of course, Mr. Scruggs would have you believe now he entertained the thought of pleading guilty to the murder of his wife when he didn't do it" (Vol. IX, p. 44).

This statement is nothing more than a reasonable comment on the evidence (TE, Vol. VI, pp. 16-17). Thus, it is the position of the respondent that the above quoted comment does not present a substantial federal constitutional issue and therefore presents no basis for discretionary exercise of this Court's grant of petition for writ of certiorari. Supreme Court Rule 19.

SUMMARY

For the foregoing reasons, the respondent respectfully submits that the application for petition for writ of certiorari should be denied because: (a) the decision of the Kentucky Supreme Court rests upon matters of state law, and (b) a substantial federal question is not presented by any of the three issues raised by the petitioner.

Respectfully submitted,

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PROOF OF SERVICE

I, Patrick B. Kimberlin, III, a member of the bar of the Supreme Court of the United States, hereby certify that three copies of this Brief for Respondent in Opposition have been mailed, first class postage prepaid, this 12th day of September, 1978, to Hon. Robert E. Harrison, Public Square, Graves Building, P. O. Box 522, Scottsville, Kentucky 42164, Counsel for Petitioner.

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